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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ANGELO PASSINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Angelo Passini, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on August 10, 1966.

JUDGMENT AND OPINION OF THE COURT BELOW

On August 10, 1966, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the North-

ern District of Illinois, Eastern Division, sentencing petitioner to imprisonment for a term of five years. No opinion was rendered by the District Court. The Opinion of the Court of Appeals has not yet been reported, but is reprinted herewith as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial in United States District Court, Petitioner was convicted of conspiracy relative to traffic in illegal narcotics, in violation of Title 21 U.S. Code, Section 174.

On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed in an opinion filed August 10, 1966.

A petition for rehearing was timely filed, and was denied on September 15, 1966.

The jurisdiction of this Court is invoked under the provisions of Title 18 United States Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Where defense counsel in a federal criminal trial becomes ill and temporarily unable to continue once trial has commenced,

A. May the trial proceed in his absence?

B. May evidence received during the absence of counsel, be considered against the defendant?

C. May the defendant be required to represent himself, where he obviously lacks any training or experience in legal matters?

2. Where evidence is received in a federal criminal trial in the absence of the attorney for the defendant, and the trial court refuses to exclude that evidence on subsequent motion,

A. Is prejudice to the defendant conclusively presumed?

B. If not, where does the burden lie to establish presence or absence of prejudice, and what showing need be made?

3. With respect to the right to counsel, can any distinction properly be made between a multiple prosecution and the prosecution of a single individual? If so, what is the basis of that distinction?

4. Does the Sixth Amendment guarantee of "assistance of counsel" contemplate only representation, or does it also encompass the right to consultation?

5. If a federal criminal defendant can be compelled, against his will, to act as his own lawyer, then,

(a) What are the minimum standards of courtesy that must be extended to such a defendant?

(b) Can he be required to be seated at a place where he is unable to hear the testimony?

(c) Can he be threatened with revocation of bail as punishment for making motions more frequently than the trial judge deems proper?

6. Is a charge of criminal conspiracy proved by evidence that the defendant offered to help the conspirators, but that his offer was rejected by them?

7. Where the record clearly establishes the probable innocence of a convicted defendant, is a reviewing court bound by the jury's verdict of guilty to the point where it must,

A. Disregard the cross-examination of the very witness whose direct examination is cited to support the verdict? and,

B. Accept uncritically, testimony of supposed events which, beyond any doubt, would have been physically impossible?

RELEVANT STATUTE AND CONSTITUTIONAL PROVISION

Title 21 U.S. Code, Section 174, provides, in relevant part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . or receives, conceals, buys, sells, or in any manner facilitates the transportation . . . of any such narcotic drug . . . knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years. . . .

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right: . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Within this presentation, reference will be had to two printed records filed in the Court of Appeals. Nine copies of each document have been filed with this Court. The first is the "Joint Appendix" filed on behalf of all appellants in the Court of Appeals. It will be referred to by the designation "(J.A. ——)". The second is a short supplemental appendix filed in the Court of Appeals on behalf of Petitioner Passini, reference whereto will be made by the designation "(P.A. .....)".

Consideration of this Petition does not require a detailed examination of the evidence introduced at the trial. It is sufficient to note that by the testimony of thirty-seven witnesses (J.A. iii-viii), the government sought to prove the allegations of a 40-count indictment against twenty-two defendants (J.A. 9-31). The evidence tended to show numerous sales of narcotics to government witnesses in and out of the presence of surveilling agents by defendants other than petitioner, between 1960 and 1963. Typical evidence, was the testimony of an agent who had hidden in the trunk of a car and heard negotiations leading to the illegal transfer of narcotics (J.A. 80-82). Equally illustrative, was the testimony of a narcotics addict to her meetings and discussions with numerous defendants in the course of obtaining the drugs she needed (J.A. 173-176). The evidenciary pictured culminated in an account of a wild running gun battle between an agent and a narcotics offender, who was killed in the fight (J.A. 323-325). (Petitioner was not a participant in any of those events. Neither the witnesses nor the principals in the cited incidents, were shown to be acquainted with petitioner Passini.)

Petitioner's contentions relate to two propositions: First, that he was denied his right to counsel at his trial; and secondly, that his conviction without substantial evidence of guilt, is a product of misapplication of the law of conspiracy and constitutes denial of due process of law.

In the interests of orderly presentation, the facts material to a consideration of each of these claims will be set forth separately.

THE REPRESENTATION OF PETITIONER

Petitioner appeared for trial with counsel of his selection, Mr. Lewis. He obtained leave to act "as co-counsel for himself" (J.A. 4), but it was clearly understood that this request did not excuse the presence of his attorney at all times (J.A. 98, 100, 112, 121). Petitioner has only a limited education, and no experience with legal procedures. (J.A. 101, 117, 383)

In the course of the direct examination of the government's third witness, and at a time when no witness had yet mentioned Petitioner, Mr. Lewis asked that he be excused briefly. It later appeared that his request had been occasioned by the fact that he was not feeling well, but felt he would be all right if he got a little air. (J.A. 76) In making his request, Petitioner's counsel stated that he knew what the immediately ensuing portions of the witness' testimony would be; that Mr. McDonnell, counsel for another defendant, had agreed to act for petitioner if necessary; and that his absence would be brief. His request was granted, with Petitioner's approval. (J.A. 69)

Later that afternoon, the Court was advised that Mr. Lewis had been taken to the hospital, suffering from an apparent mild heart attack (J.A. 76). Petitioner stated that he had agreed to the absence of his counsel only for

a short period. After further colloquy, he agreed to permit Mr. McDonnell to represent him for the remainder of the day, but stated that if his lawyer were not present on the following day, "I feel that I should have the proper representation." (J.A. 77)

The Court replied that tomorrow was another day, and "we will cross bridges as we come to them." It was agreed that both government counsel and Petitioner would attempt to determine the seriousness of counsel's illness. The Court instructed: "Make your inquiry, and be prepared to look for additional counsel tomorrow." (J.A. 77, 78)

The next day, both Petitioner and government counsel stated that Mr. Lewis was unable to continue. Petitioner stated that he did not want to be represented by other counsel in the case because "they have other clients and I don't feel that I would be getting proper representation." He asked "for a continuance or a separate trial." (J.A. 98, 99)

Government counsel objected that "If he wants to hire additional counsel to help him in the trial, he had yesterday to do it." However, the government had no objection to a recess for the purpose of retaining counsel (J.A. 99).

However, the trial judge held that there was no conflict of interest between Petitioner and any other defendant who was charged only in the conspiracy count. He designated Mr. McDonnell, who represented clients also charged in four substantive counts, to represent Petitioner pending retention of other counsel (J.A. 100)

Petitioner said he did not want to be represented by any other lawyer in the case, and asked for "some time to get a lawyer." The court directed that he be seated and represent himself. (A. 100, 101)

Petitioner objected that he was unable to represent himself; that he wanted his lawyer; that he had only two years of high school, and that "I feel that I am entitled to some sort of representation of my own choice." (J.A. 101)

He asked for permission to make a statement to the jury when it returned to the courtroom. He was directed to sit down "and conduct yourself as an individual here and as a defendant." (J.A. 102)

Petitioner asked if he might ask a question. The court directed the marshal to force him to sit down.

Other counsel in the case suggested a recess to enable them to consult with Petitioner. The court consented, "but he is not going to run the court. Do you understand?" (J.A. 103)

Following the conference, court reconvened and Petitioner consented that Mr. McDonnell might represent him for the balance of that day. (J.A. 103)

The next morning, Petitioner stated that he had consulted with three lawyers between court sessions, but that they had all been unable to enter the case because of other commitments. He stated that he had accepted representation by Mr. McDonnell although he did not really want it, and against his better judgment, "and I'd like to have my attorney with me, because I am afraid." (J.A. 112-113) The court denied this "motion", and directed that Petitioner represent himself. He excused Mr. McDonnell from further responsibility for protecting Petitioner, and ruled that "No one else has that obligation". (J.A. 114)

Shortly thereafter, Petitioner objected to a question asked by a defense lawyer on cross-examination, stating "These people are all strangers to me." The court denied

the objection and admonished the defendant that he had been told "to make no demonstrations before the jury." (J.A. 115)

At the conclusion of the witness' testimony, government counsel suggested the appointment for Petitioner of counsel not representing any other defendant, in order that Petitioner might be represented "by counsel who had no other interests in this case save his own." (J.A. 116) The court had indicated that "some new lawyer who could come into this case" would suffer for want of familiarity with it. (J.A. 102) In response to the government's suggestion, the judge asked whether Petitioner would accept an attorney "who was appointed by the Court who he himself had not chosen." (J.A. 116) Petitioner said he wanted an attorney, and had been looking for one. The Court said that this was not an answer to the question, and insisted upon a direct answer. The defendant finally answered: "Your Honor, I would not accept another lawyer, because I want my own lawyer." (J.A. 116-117)

The judge thereupon denied the government's motion and directed the defendant "not to make any demonstrations." He advised the defendant that the limited education was not material because "my father never went any farther in school than you did, and I never knew a better educated man from the standpoint of understanding human nature. . . . Formal education is not the criterion of success." (J.A. 117) The court instructed the defendant not to make "silly objections" because it constituted interference with the lawyers.

Petitioner stated that he was attempting to contact another lawyer, but the Court advised him that the lawyer was going to be starting "the Hoffa trial . . . It is a wonder to me that you do not call for Mr. Belli." (J.A. 118)

Petitioner said he had another motion. The court stated that its patience was wearing thin, and threatened Petitioner with revocation of bond (J.A. 119).

Petitioner again moved for a continuance (J.A. 119, 120). The court said that it had spoken to Petitioner's counsel, and had been advised that he would not be back that week, so the motion would be denied. (J.A. 120)

The court then recalled the jury, and instructed them that petitioner's lawyer had been taken ill; that there was "no conflict of interest whatsoever" between petitioner and the other defendants, but that petitioner had refused to accept representation by other counsel in the case; that each of the lawyers had been willing to represent him, but that Petitioner had refused such services; that Mr. McDonnell had not asked to be relieved of petitioner's representation, but that it was Petitioner who refused to accept his services; that the government had suggested the appointment of "outside counsel", but that Petitioner had refused that offer. The Court advised the jury that "we have done everything we can to get him representation, fair representation—the court has."

The court further instructed the jury that "an outside lawyer, the best of them, could not begin to represent him as well as any one of these other lawyers." He stated that Petitioner had a right to make objections even though he was objecting "to cross examination or examination by other lawyers that might be to his interest." The court concluded the instruction by expressing the desire that the jury "understand that he is not being compelled to represent himself except under the conditions which I have outlined." (J.A. 122-123)

Thereupon, cross-examination of the witness resumed. Shortly thereafter, and not in response to any objection or other matter appearing of record, the court stated that Petitioner was disturbing the other lawyers, and directed that the Marshal cause petitioner to be seated "back there with you." (J.A. 123)

When the examination of the witness was concluded, the Court asked Petitioner whether he had any questions (J.A. 123). Petitioner asked that the jury be excused. The Court directed Petitioner to state whether he had any questions of the witness. Petitioner replied that he had been unable to hear what the witness had said. (J.A. 124)

The Court again asked if Petitioner wished to question the witness. Petitioner answered that he did not know whether he did or not, "because I don't understand law, and I wouldn't be able to give you a truthful answer." The court excused the jury, and Petitioner said that he was nervous and sick. The court recalled the jury, and pressed Petitioner for a statement as to whether he had any questions. Petitioner again stated that he had not been able to hear the testimony.

In response to repeated demands, Petitioner persisted that he was unable to decide whether to ask questions because he had not heard part of the testimony, because he did not understand law, and "because I don't have counsel." The court directed that "the record show he has been given every opportunity to ask the question. He persists in not asking the witness any questions." (J.A. 125)

Subsequently, the court directed another defense counsel, whose representation extended to the substantive counts, to make objections or motions on Petitioner's behalf,

"whether he accepts it or not . . . whether he joins in or asks you to or not. . . . whether he . . . consents or not." (J.A. 126)

The Court inquired whether any lawyer could think of any question to be asked on Petitioner's behalf, and was told "No." Petitioner apologized, but objected to the representation by lawyers who "have other clients to represent. I do not feel right about it." (J.A. 127)

Still later, at Petitioner's request, counsel for a co-defendant "asked me, not as his attorney, to state to the Court that he would like the Court—so he would not interrupt—to have a standing motion as to each session that he is making a motion for a continuance because he does not have his counsel." The motion was denied. (J.A. 136)

Thereafter, Petitioner prepared and caused to be read to the Court, a statement reiterating his position. Essentially, he objected to the evidence, stated that he was emotionally and professionally unable to represent himself, stated that he did not want other counsel in the case to represent him because they had their own clients and he would not get proper representation. He asked for a severance. The request was denied. (J.A. 143)

Eight days after his attack, having missed six days of evidence, Petitioner's counsel returned to the trial. He stated that he was unable to "accomodate my client to the extent that he wants to be accomodated", but that he was able to provide "reasonable assistance and representation" on a more or less limited basis. The trial proceeded, and the prosecutor agreed to notify counsel in advance of any evidence specifically concerning Petitioner. (J.A. 167-168).

The first direct reference to Petitioner by any witness, came in the testimony of Barbara Mitchell, about two days following the return of Petitioner's counsel. Petitioner's

name had not been mentioned by any witness prior to counsel's illness, although his counsel had cross-examined a witness (J.A. 57).

When the government tendered all evidence against all defendants, counsel for Petitioner objected to the introduction against him of any testimony taken at a time when he was not represented by counsel. That objection was overruled, and the evidence was received against Petitioner. (P.A. 5, 6)

EVIDENCE REFERRING TO THE PETITIONER

Petitioner was named in only one of the forty counts of the indictment: the conspiracy charge. He was given a statutory minimum sentence of five years upon his conviction, which was the only minimum sentence imposed (J.A. 8). He had no previous record of convictions (J.A. 383). He was mentioned by only five of the government witnesses, and much of that testimony was merely corroborative of his presence at a restaurant frequented by other defendants. Detailed discussion of the evidence concerning him, including related matter not directly involving him, is here presented with the assurance that a very complete presentation can be made with brevity.

The Mitchell Incident

Government witness Barbara Mitchell was arrested in April of 1962 in St. Louis for the sale of narcotics (J.A. 199) to a government agent (J.A. 198). She thereupon gave a statement (J.A. 199) detailing her experiences as an "investor in narcotics" (J.A. 200) and a courier of narcotics from defendant Cole commencing in April of 1960. (A. 190) In the course of her association with Cole, she deviated from time to time from her normal activities,

and in doing so, she testified, she had fortuitous but highly incriminating encounters with a number of defendants, each of whom she saw only once (J.A. 195, 196) in addition to others with whom she dealt frequently. (J.A. 190-198).

On giving her statement, Miss Mitchell, who had theretofore been convicted of larceny and forgery in separate incidents (J.A. 190), was released on bail (J.A. 200). At the time of her testimony she did not know whether she was still under indictment (J.A. 199).

Within her statement she described an incident which occurred about August 22, 1961 (J.A. 206). (The indictment set the date as "during or about the month of September, 1961", J.A. 13, but Miss Mitchell did not mention this incident in her grand jury testimony, Tr. 2596).

On that day, she testified, she was invited to take a ride with defendant Cole. She was not aware that the ride had an illegal purpose (J.A. 206). The two of them went to a motel parking lot, where a man entered the car and received $5,000.00 from Miss Cole. In exchange, he gave Miss Cole some "stuff . . . so strong he had to put on a mask while mixing . . ." (J.A. 196)

Witness Mitchell, in her testimony, identified this man as petitioner Passini (J.A. 196). She had seen him only that one time, and not again before taking the stand 32 months later (J.A. 208). She recalled nothing unusual about him, and could not remember whether he had worn a mustache, and could not describe or characterize his voice. In entering and leaving the car, and in walking away, there had been nothing unusual about his actions (J.A. 207).

Petitioner, in testifying and denying the episode, pointed out that his left leg had been removed at the hip in con-

sequence of a hunting accident at the age of eleven; accordingly, he could not walk normally, and could not enter and leave vehicles and walk away from them like other people. (J.A. 383, Tr. 5045) Agents who had observed petitioner, also testified as government witnesses to his pronounced limp ("He walked like a man with one leg or wooden leg"; P.A. 5).

Miss Mitchell had been in the front seat of the car ("I just sat there, faced forward . . ."), and the man she identified as petitioner had climbed into the rear seat before she saw him (J.A. 206). In describing the incident to the agents, she said she was not sure whether she could identify the man if she saw him again, because she had been sitting in the front seat while he was in the back seat. At first she denied having said that, but confronted with her written statement, she then admitted it. (J.A. 207-208, Tr. 2651).

Miss Mitchell's testimony concerning this episode was not corroborated.

The Incident of September 16, 1963

During the period of more than two years following Miss Mitchell's statement, an intensive investigation was made. Defendants Cole and Johnson were indicted and arrested, with 30 others "in different cases", in December of 1961 (J.A. 95, 96). Government agents observed and participated in purchases of narcotics involving many defendants (J.A. 152, 224, 238, 247, 252, etc.). Defendant DeMaro was also arrested in December of 1961 (J.A. 250) and indicted in a charge "superseded" by the indictment here referred to (J.A. 386).

However, no witness testified to any observation of petitioner, or even to any declaration relating to him, from the time of the Mitchell episode until September 16, 1963, more than two years later.

Petitioner Passini testified that he had been friendly with co-defendant DeMaro for many years, and had worked with him until 1961. During that period, he frequently met DeMaro at Andy's Grill, located in a neighborhood where Petitioner once lived. Subsequently, as a salesman, he would make two or more trips weekly to a firm on the north side of Chicago where his home improvement sales were financed. In doing so, he would sometimes stop at Andy's Grill to eat or drink, and had met and talked with DeMaro on some of those occasions (J.A. 381-382).

Petitioner testified that he had no specific recollection of September 16, 1963 (J.A. 382). From the testimony of agents, it appears that on that date, co-defendant Frank Carrioscia was observed discussing a sale of narcotics to a government informant (J.A. 305). Carrioscia went from there to Andy's Grill. Some time later, Petitioner drove up and entered the grill. Carrioscia and Battiato then left the grill and had a conversation on the sidewalk (J.A. 255). They separated, and met again at Battiato's home where Battiato gave Carrioscia a package. Carrioscia then drove to a bar on the near southwest side where he delivered narcotics to the informant (J.A. 256).

Petitioner, meanwhile, was seated at Andy's Grill conversing with DeMaro. An agent, seated four feet away, found nothing in their conversation to merit repetition in his testimony, to the extent that he observed it. Battiato, having apparently observed the agents following Carrioscia's car after his delivery of narcotics to Carrioscia, entered the grill. He walked to the table where DeMaro

and Passini were seated, and announced, "We are in trouble." Petitioner looked up and asked, "What is wrong?" Battiato, looking at DeMaro, stated that a vehicle had followed "Frank" (J.A. 306).

Two agents testified that Petitioner then asked, "Do you think we should call Frank?" (J.A. 284, P.A. 2) DeMaro, addressing his attention to Battiato, answered in the negative, stated that Carrioscia had not yet had time to reach his destination, and said "We will go over there." Thereupon, all three left the grill. Petitioner entered his car, drove away, and was not followed. Battiato and DeMaro entered their car and went to Carrioscia's destination where they met him and conversed. Petitioner was not seen again that night (J.A. 306, 284).

The recitation of the opinion that petitioner "suggested that Carrioscia be contacted" (Appendix A, p. App. 10) is a quotation from the government's argument in that Court. Petitioner only inquired whether that should be done, and was informed that it was not possible because Carrioscia had not yet arrived at his destination.

Agent testimony concerning Carrioscia's activities, establish that it was the pattern that he would arrange his narcotics transactions on the near west side, and then meet Battiao, DeMaro, or both at Andy's Grill or at another nearby tavern in the vicinity of Battiato's north side apartment. He would receive a package, and then make delivery at or near his west side headquarters (J.A. 293-297; 273, 276, 277). September 16, 1963, was the only date on which Carrioscia's visit to the north side area coincided with Petitioner's presence there.

The incidents of September 27, 1963

Theodore ("Ted") DeRose, one of the original defendants in this action, was severed from the trial after its commencement when he was hospitalized. That occurred prior to the reception of evidence concerning the events of September 27, 1963.

Notwithstanding his severance, DeRose was shown by the evidence to be heavily involved in the narcotics traffic. On a number of occasions, he delivered a package to Battiato on the sidewalk in front of Battiato's home (J.A. 267, 269, 258).

Petitioner and DeRose both walk with a limp: petitioner in consequence of amputation, DeRose because of organic illness (P.A. 4, J.A. 383, 270).

In its submission to the Court of Appeals, the government successfully contended that the evidence had shown that on September 27, 1966, Petitioner "was seen bringing a brown paper bag to Battiato's apartment . . ." (Gov't Brief in Court of Appeals, pp. 48-49).

To support that assertion, the government relied upon the testimony of Agent Aruslan, who testified that in the evening of September 25, 1963, he saw Battiato walk back and forth in front of his home, and saw DeRose walk by and give Battiato a package. Two nights later, Battiato again began to walk back and forth in front of his home (J.A. 267), an area obscured by shadows (J.A. 271). Shortly after Battiato began walking, Aruslan testified, "Angelo Passini walked west toward Battiato's residence. Ted DeRose was walking with a noticeable limp and he was carrying a brown paper package under his left arm. Angelo Passini met Battiato in front of the building and they both entered." (J.A. 267)

On two subsequent nights, Agent Aruslan again saw Battiato walk back and forth in front of his home. Both times, he was met by DeRose (J.A. 267-268, October 8, 1963; J.A. 269, October 15, 1963).

The contents of the packages were not proven.

Another agent offered conflicting but incriminating evidence concerning petitioner's activities that night. A few minutes after petitioner, according to Aruslan's testimony, entered Battiato's home, Agent Patch testified that he saw Petitioner, whom he did not then know, enter Andy's Grill and advise "Mike" (DeMaro) that "Frank" (Carrioscia) had only brought a thousand dollars, and would be there shortly. According to Patch, DeMaro expressed dissatisfaction with the amount (J.A. 272).

This was Patch's first sight of the speaker, and nobody else was present to make an identification. The speaker was "subsequently identified" as petitioner, but there is no evidence as to how that was done (P.A. 3). Patch, pretending to be an amorous conventioneer, had had at least two drinks before seeing the speaker. Agent Connolly, who was maintaining surveillance outside Andy's Grill (P.A. 2) and who testified to his observations, did not testify to seeing Petitioner enter; rather, at about the time Patch says he saw Petitioner arrive, Connolly saw DeRose enter the grill (J.A. 258). Aruslan, continuing to observe the Battiato building, told of Battiato leaving the building, but did not mention petitioner doing so (J.A. 267). Agent Connolly saw DeMaro meet Carrioscia an hour later, express to Carrioscia considerable satisfaction at receiving from him a thousand dollars, and then rejoin DeRose (J.A. 258).

Agent Olivanti, who had Carrioscia under surveillance all evening, and who knew Petitioner, did not see Petitioner on that date. He followed Carrioscia to the grill area, and saw him meet with Battiato and DeMaro and receive a paper bag from them (J.A. 284, 285).

The incident of October 15, 1963

In its submission to the Court of Appeals, the government did not rely on the events of October 15, 1963, as demonstrative of petitioner's guilt. (Gov't Brief in Court of Appeals, pp. 48-49). However, it is the only evidence in the record, except for that hereinabove cited, of any observation of or reference to petitioner by or in the presence of a government witness. It is submitted in the interests of completeness of presentation, and because it may be relevant to an understanding of petitioner's relationship to his co-defendants.

In the late afternoon of October 15, 1966, Battiato, De Maro, and DeRose were standing in front of Andy's Grill in conversation. Petitioner arrived. The group thereupon dispersed. Petitioner left (J.A. 269).

He was not followed, either by the government or the conspirators.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

Denial of the Right to Counsel

In the aspect of the trial court's handling of the situation created by the disability of Petitioner's counsel, it is hard to believe that the record before your Honors is that of a contemporary Federal criminal trial.

At an early state of his trial, and without the slightest fault on his part, Petitioner was suddenly thrust into the least enviable situation which can befall a criminal defendant: He was deprived of his lawyer. He was denied the most meaningful of the safeguards provided by the Constitution.

The deprivation was total. The only representation available to him, was on a makeshift basis from lawyers whose principal allegiance was to others. Consultation, to all effects, was totally denied him.

He was without formal education, and without courtroom experience. His difficulties demanded consideration.

His lawyer was absent for six trial days. The first day, Petitioner accepted representation from another lawyer in the belief that it would only be for "a few minutes." (J.A. 69) The second day, he accepted McDonald only after receiving threats and verbal bludgeonings from the trial judge, and for that one day only (J.A. 98-103). For the remainder of his lawyer's absence, Petitioner was totally deprived of any semblance of his right to counsel.

From the trial court, charged with the protection of his rights, he received only rebuffs. He was cowed, bullied, and overpowered. He was denied both fairness and common courtesy.

The directions given to him constituted a mass of contradictions that would have defied analysis by the most seasoned of lawyers.

When it was first learned that his lawyer had been taken to the hospital, he was told to finish out the day's court session, and then make inquiries concerning his lawyer's condition and, if necessary, "be prepared to look for additional counsel tomorrow." (J.A. 78)

On "tomorrow", his inartistic but unequivocal request for continuance or severance, was met with the startling suggestion that "if" he wanted to hire a lawyer, "he had yesterday to do it." (J.A. 69)

The next set of directions related to Petitioner's rights, duties and status at the trial. After further colloquy, the trial court told the defendant to represent himself. Having conferred upon Petitioner the unwanted status of ad-hoc lawyer, the trial court enlightened him as to his status by directing him "to sit down and . . . conduct yourself as an individual here and as a defendant. Do you hear me?" (J.A. 102)

Petitioner heard him. Not unreasonably, he tried to ask a question. At least one question compellingly suggests itself to any reader of the record at this point. But petitioner's question will never be known. The trial court welcomed him to his uncertain status, by directing the Marshal to force him to sit down (J. A. 102).

On the following day, after the trial judge had clearly ruled that nobody had any duty to protect Petitioner's rights (J.A. 114), Petitioner objected to a question asked

on cross-examination by "co"-counsel. His objection was that "these people are all strangers to me." Granted, that is about as inartistic a phrase as any "lawyer" ever used to make the objection that the transaction had not been shown to have the slightest connection with the objecting defendant. But there is also no question that the objection was legally sound. The trial judge thought that it was "silly." (J.A. 118) The court cautioned him against "demonstrations", and told him to make his objections "as a lawyer would make them." (J.A. 115)

The fact that Petitioner was totally unqualified to meet the standard which the court imposed upon him, was not considered by the trial judge to be a mitigating circumstance. The court offered Petitioner the cold comfort that formal education was relatively unimportant. "My father," the trial judge recalled, "never went any farther in school than you did, and I never knew a better educated man from the standpoint of understanding human nature." (J.A. 117) However, Petitioner's liberty depended upon his understanding of *law*. The irrelevance of an understanding of human nature to the resolution of Petitioner's difficulties, is manifest in many of the observations of the trial judge.

The trial judge knew human nature. "I know how to handle fellows like you," he advised Petitioner. Unless Petitioner somehow contrived to act as his own lawyer and at the same time "conduct yourself like these other defendants . . . I will have to revoke your bond and put you in custody . . . Now, that is exactly what I am going to do." (J.A. 119)

Such a threat, of course, is a grave impropriety. Bail should never be denied as a disciplinary matter. *Reynolds v. U.S.*, 4 L.Ed 2d 46, 48 (memorandum). But Petitioner

did not know that, and the trial judge said he had done it before (J.A. 119). Petitioner might well have believed that he had *no* rights remaining to him.

Charged, willy-nilly, with the conduct of his own defense, Petitioner did not do nearly so well as an earlier pro-se litigant named Clarence Earl Gideon (*Gideon v. Wainwright*, 372 U.S. 335, 337). But then, Petitioner did not enjoy Gideon's advantages or resources as trial "counsel". Almost as soon as Petitioner was resigned to the practice of his unwanted profession, he was advised, for reasons not apparent of record, that his presence was "disturbing the *other* lawyers." (J.A. 123, emphasis added). Thereupon, the Marshal was directed to move him "back there." "Back there" was a place where Petitioner was unable to hear the testimony (J.A. 124).

Thus, to Petitioner's right to counsel himself, there was added the right to confront his accuser at long range, with visual faculties only.

Petitioner defended himself through a glass, darkly.

If the right to counsel has any meaning at all, it means something substantially more than Petitioner received.

The court was constantly concerned, and expressed its concern vividly. But the concern was not that Petitioner was being deprived of basic rights; it was concern lest the jury might feel more sympathy for him than did the trial judge (J.A. 102). To forestall such "prejudice", the court moved promptly, vigorously, and repeatedly. It lost no opportunity to express its scorn for the Petitioner, whose knowledge of "human nature" had not encompassed an appreciation of the availability of a motion for mistrial.

The court accordingly advised the jury that the defendant was representing himself, only because he had unrea-

sonably refused to accept the services of other counsel in the case. By way of assuring the jury that petitioner was less an individual than a part of a group, the judge made it clear that there was "no conflict of interest whatever" between Petitioner and the other defendants. In the court's expressed view, Petitioner had ungratefully refused to accept the noble offer of protection from a lawyer representing the very defendant (DeMaro) whose acts the jury was most likely to attribute to Petitioner, and whose plain guilt necessarily prejudiced other defendants. The trial judge pleasurably recalled past associations with the other lawyers in the case, to no apparent relevance. The court cautioned the jury that it would generously extend to Petitioner his right to make objections, even though they might be made improvidently to evidence that was really helping Petitioner. It particularly cautioned the jury to understand that it was only Petitioner's obtuseness which caused him to represent himself (J.A. 121-123).

On that basis, the trial judge assured the jury that "we have done everything we can to get him representation, fair representation—the court has." (J.A. 122)

To which any objective reader of the record must demur. The court had not been nearly so exhaustive or resourceful in that regard, as its prideful statement to the jury would indicate. For when, on the morning after his lawyer's illness, petitioner asked for "some time to get a lawyer" (J.A. 101), the trial court not only flatly denied the request (J.A. 101) but expressed amazement that Petitioner would dare ask for an adjournment "for your convenience." (J.A. 100-101). The request was not even slightly unreasonable. It was a matter of substance, necessity, and right, not "convenience." And it was the very thing which the trial judge had, on the preceding day, led the Petitioner to expect (J.A. 78).

Nor was any meaningful representation offered to Petitioner.

The Trial Court's disappointment at Petitioner's reluctance to accept newly appointed "outside counsel", is completely inappropriate. Before making the offer, the Court had admonished Petitioner that a lawyer thus appointed would not be able to do a very good job for him because of his unfamiliarity with the case (J.A. 102). It is hardly surprising that Petitioner would not agree to a procedure which the Court itself had termed unsatisfactory. The Court later repeated that such representation would not be particularly effective (J.A. 122).

Nor would Petitioner have received completely effective protection from another lawyer representing a co-defendant. The allegiance of such a lawyer would have been divided in terms of representation; and Petitioner would properly have felt restricted in his consultation with such a lawyer.

Petitioner requested, and was entitled to, counsel whose only allegiance would be to him. In view of the complicated nature of the evidentiary picture, such a lawyer was indispensable for any defendant as to whom the evidence was thin—and it was tissue thin as to Petitioner. The trial judge asked Petitioner to accept counsel whose principal loyalty was to other defendants heavily involved. The court particularly emphasized the availability of Mr. McDonnell, whose client (DeMaro) was clearly shown to be guilty of infamous behavior at a place and time at which the Petitioner claimed to be present coincidentally and innocently. It is also worthy of note, that after Petitioner had testified that he worked with DeMaro years before the offenses charged and was friendly with him (J.A. 381, 382), DeMaro testified that during that period his pro-

fession had been that of confidence man frequently arrested, and that Passini was involved in those activities (J.A. 387). Clearly, Petitioner's liberty depended upon the jury's believing that there was no unlawful connection between him and DeMaro. No lawyer could competently represent both men except in the most routine and irrelevant matters, such as the testimony which was being introduced when Petitioner's lawyer first felt ill (J.A. 69).

Even worse, if possible, than attempting to foist conflicting representation on Petitioner, was the trial judge's assurance to the jury that "no conflict of interest whatever" existed between Petitioner and the other defendants (J.A. 121). That assurance was totally incorrect. The trial judge had no basis for it, save for the assurance of the government, which could not possibly know if it were true. And even if it had been true, so to advise the jury was still an obvious impropriety. There may be no legal "conflict", but the jury could well infer association from the judge's remark. Petitioner, insisting upon his innocence, had at least some conflict of interest with any other defendant whom the jury might believe to be guilty. It was necessary for him to disavow the taint of association. The trial judge's remark made it impossible for him to do so.

* * *

On that state of the record, the Court of Appeals has found that the trial court "committed no error in handling this difficult situation."

But even to make such an evaluation, one must first assume as a premise that the trial must proceed, whether or not the Petitioner were represented by counsel, and notwithstanding that he certainly did not waive that right.

The "difficult situation" would not have been the least bit difficult, if the trial court had shown anything beyond

a perfunctory concern for Petitioner's right to counsel. Available remedies for the situation were:

A. The declaration of a mistrial as to Petitioner. Such action would have given Petitioner no unconscionable advantage. He had yet to hear the first word of the government's theory as to him. A separate trial for Petitioner would entail the calling of only five government witnesses. That seems a small price for the preservation of the integrity of the basic right to counsel.

B. A postponement sufficient to enable Petitioner to find a lawyer and acquaint him with the case sufficiently to enable him to act. True, that would have delayed the trial. But if it were deemed so vital, for no reason now apparent, to try Petitioner as part of a group rather than individually, it is at least equally vital to provide him counsel of his choice while he is being tried.

C. At a basic, irreducible, minimum—the very least to which Petitioner was entitled, by any known Constitutional standard—the evidence received in the absence of Petitioner's counsel, should have been excluded as to him. A specific motion for such relief was made and denied when the questioned evidence was offered against Petitioner. (P.A. 5, 6).

* * *

But for the incredible treatment received by Petitioner at his trial, and the approval of that treatment by the Court of Appeals, we should have deemed it nothing more than unwholesome and puerile pedantry, to urge to this Court the importance of the right to counsel.

The right is basic. It is of express Constitutional dimensions. It has been jealously guarded, and recently extended,

by this Court. *Gideon* v. *Wainwright*, 372 U.S. 335; *Escobedo* v. *Illinois*, 378 U.S. 478; *Miranda* v. *Arizona*, 384 U.S. 436.

And it is seriously imperiled by the decision of the Court of Appeals here sought to be reviewed.

The philosophy underlying that opinion, is that trials are given to groups, rather than to individuals. The test of the right to counsel, according to the opinion, is not whether a defendant is being tried, but whether he is being directly and personally accused from the witness stand.

The Court of Appeals here has flatly held that as long as a witness is merely giving background material, which will not be admitted against the defendant until further evidence has been heard, the defendant is not entitled to a lawyer.

The doctrine is fearful. It is at war with every expression on this issue which has ever been heard.

And it carries within itself a fatal contradiction. If the evidence was immaterial to a consideration of Petitioner's guilt, it should not have been admitted against him. If it was sufficiently material to merit ultimate admission against Petitioner, then Petitioner was entitled to counsel when it was being received.

It would unduly prolong this petition to discuss the testimony of each witness heard in the absence of Petitioner's counsel. But it is worthy of note that during the absence of counsel, a witness testified that Petitioner's supposed co-conspirator, Isaacson, could obtain only low-quality narcotics (J.A. 144, 145) at the very time when, according to later testimony, Petitioner was mixing narcotics so rich as to be dangerous (J.A. 196, 206). That type of logical contradiction would only suggest itself to a lawyer present

at the trial and concerned with the analysis of each item of evidence in the light of its relationship to Petitioner. It was that kind of representation which Petitioner repeatedly requested; and he was entitled to nothing less.

Above and beyond the question of representation, was the equally important right of consultation. This was denied to Petitioner entirely. Petitioner could not with confidence discuss evidentiary developments with lawyers whose principal allegiance was to others; and there is no slightest reason why he should have been required to do so.

The right of consultation has properly been accorded an importance equal to the right to representation. In *United States* v. *Venuto,* 3 Cir. 1950, 182 F.2d 519, 522, a criminal conviction was reversed because the defendant had been denied the right to consult with his attorney over a period of 18 hours.

In the case here sought to be reviewed, the Court of Appeals ignores and, *sub silentio,* denigrates the importance of the denial of that right over a period of six trial days and eight calendar days.

We do not ask that this Court speculate whether a six-day denial of the right of consultation, is eight times more serious than an 18-hour denial. Arithmetic is inapplicable. The right has been denied. A right of that magnitude and importance is not denied somewhat, or partially, or moderately. It is a right which is granted, or which is denied. There is no middle ground.

As this Court stated in *Glasser* v. *United States,* 315 U.S. 60, 76:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The opinion below goes beyond "nice calculation." It imposes upon a defendant who has been denied counsel over a period of six trial days—unable to cross-examine, to reason out inferences, to consult, to defend himself against a determined onslaught by the trial court itself—the duty to demonstrate wherein he was prejudiced by the absence of counsel. It concludes that the Petitioner has not carried that burden.

If such burden existed, Petitioner has carried it amply. But it does not exist. The proper rule, we submit, is the directly contrary holding of *United States* v. *Venuto*, 3 Cir. 1950, 182 F. 2d 519, 522:

> "We reject the Government contention that defendant and his counsel must prove affirmatively the exact prejudice produced by (denial of right of consultation). (This would) require them to disclose what would have been privileged communication between attorney and client . . . (and would violate the rule of *Glasser*, supra)."

* * *

There was used against Petitioner evidence taken and rulings, many of them highly questionable, made at a time when he did not have counsel in contravention of the guarantee of the Sixth Amendment. The procedure approved below, is much greater incursion into the right of counsel, than that which, upon the same principle, impelled reversal in *Massiah* v. *United States*, 377 U.S. 201. The conduct of Petitioner's trial, inflicted upon him a deep and basic wrong. The conviction was the product of obvious unfairness, and should not be permitted to stand. The precedent set below is ineffably dangerous, and contains the seeds of mischief which could effectively destroy the right to counsel.

II.

The Sufficiency of Proof of Guilt

Petitioner was charged with the crime of conspiracy. This is a charge which deservedly enjoys considerable popularity in prosecutive circles, largely because its preferment often obviates the necessity of proof of guilt. (24 Brooklyn L. Rev. 1; 44 Marquette L. Rev. 73)

In affirming Petitioner's conviction, the opinion relies upon two supposed facts. Even by the relatively lax standards applied to the evaluation of evidence in conspiracy prosecutions (3 Buffalo L. Rev. 242, 251), those facts are not established by the record. Nor are any other facts presented, sufficient to justify conviction.

It is, perhaps, unusual to petition for certiorari on the grounds that the Petitioner is not guilty; and this Petitioner urges that precise contention.

But the generally accepted elements of due process, are: notice, an opportunity to be heard, and findings based on the evidence. *Tot* v. *U.S.*, 319 U.S. 463, 473 (concurring opinion); *Smith* v. *Dental Products Co.*, 7 Cir. 1948, 168 F 2d 516, 519.

Of the three elements, Petitioner was accorded only notice.

* * *

The opinion relies upon a supposed suggestion by Petitioner that Carrioscia be contacted under incriminating circumstances.

That recitation within the opinion, is not the product of the evaluation of evidence by the Court; it is, and purports to be, only an uncritical acceptance of a statement in the Government's brief.

The statement is in error. Petitioner did not "suggest" that Carrioscia be contacted. True, one witness so testified on direct examination (J.A. 306); but on cross-examination, it clearly appeared that Petitioner merely *asked,* in highly equivocal circumstances, whether "Frank" should be called (P.A. 2). Another government agent-witness also testified that Petitioner had merely *asked* whether "Frank" should be called. (J.A. 284).

The difference is profound. To "suggest that Carrioscia be contacted" might well be highly sinister. But, in the context of that conversation, to *ask* whether "Frank" should be contacted is on its face completely innocent. "Frank" was not identified in the conversation; and there is no more reason to believe that "Frank" was considered by Petitioner to mean Carrioscia, than to think that it might be any other "Frank", including the perfectly innocent "Frank" who owned Andy's Grill (J.A. 389).

More to the point, however, is the fact that even if the conversation be given the most sinister possible implication, it would not constitute Petitioner a conspirator. For in response to Petitioner's question, the conspirators responded that calling Frank would be a completely impractical idea. Accordingly, "Frank" was not called (J.A. 284, 306).

The significance of that development, is that there was no agreement between Petitioner and the conspirators. And a conspiracy requires an agreement; by definition, a conspiracy *is* an agreement. 72 Harvard L. Rev. 926. Here, there was no agreement. There was, at worst, a mere unaccepted offer to conspire, which is insufficient to constitute the offeror a conspirator.

Viewed in the context of all of the evidence, the conversation is completely innocent in its character. The pattern of evidence clearly shows that Petitioner was a mere tol-

erated bystander, as a friend of DeMaro, at the scene of unlawful activity. He did not participate in the conspiracy, and the conspirators took substantial precautions to prevent him from learning anything about the operation. Thus, characteristically, when Petitioner blundered into a conversation concerning crime, the conversation ceased and adjourned to another place (J.A. 269, 255).

Anent the conversation concerning the possibility of calling "Frank", the testimony of the eavesdropping agent makes it clear that the discussion was between Battiato and DeMaro. Passini was obviously an interloper, and was ignored by the conversants (J.A. 306). The context of the conversation makes it very clear that Petitioner did not know what was going on. Battiato and DeMaro knew, as anyone knowledgeable concerning the transaction must have known, that Carrioscia had just left the area, and that it would take him some time to reach his destination. The agents' account of the conversation, makes it very clear that Petitioner knew none of these things, and is persuasive evidence of his innocence.

Following the conversation, Battiato and DeMaro went to Carrioscia's destination, and Petitioner went on about his business somewhere else. Two agents were present, and both chose to follow Battiato and DeMaro and to ignore Petitioner (J.A. 306, 307, 284).

Every circumstance surrounding the conversation, is inconsistent with Petitioner's supposed status as a conspirator.

* * *

The other item of evidence relied upon within the opinion of the Court of Appeals to demonstrate Petitioner's guilt, is the "Mitchell episode" discussed in the Statement of the Case. The testimony of witness Mitchell is cited to

show that Petitioner delivered heroin to a car in which she was sitting. But it was *physically impossible* for her testimony to be true. She testified that Petitioner got into the car, got out of the car, and walked away in a normal manner (J.A. 207). But he could not possibly have done that; his left leg was removed at the hip years ago, and he cannot possibly enter and leave an automobile and walk away in a normal manner (J.A. 383). His wooden leg gave him a noticeable limp to which the agents testified (J.A. 270; P.A. 5).

Witness Mitchell, who had somehow managed to observe incriminating acts on the part of almost every defendant on trial, is much less than certain concerning her identification of Petitioner. The supposed event occurred two years before Petitioner entered the testimonial picture painted by the government agents. Mitchell had not seen Petitioner before she testified. She could not even remember whether the man she saw had a mustache. She had furnished no description to the agents when she told her story, explaining that she was not sure whether she could recognize the man again because of her limited opportunity for observation (J.A. 207-208). The idea of a man entering a car and identifying himself as a narcotics peddler in front of a stranger, is sufficiently startling in itself to justify considerable suspicion of Mitchell's testimony.

But in any event, it remains a stark fact that the story of witness Mitchell would have been a physical impossibility for Petitioner.

At pages 48 and 49 of the Government's brief in the Court of Appeals, three other supposed facts are cited to support the claim of Petitioner's guilt. The evidence relative to each of the incidents relied on by the government,

is fully discussed in our Statement of the Case. We will here briefly argue the inferences of each of the incidents relied upon by the government, in order to demonstrate the lack of any basis for Petitioner's conviction.

The government cited (Br. 48) Petitioner's "close association" with Battiato and DeMaro. Petitioner testified to a long friendship with DeMaro (J.A. 381); and Battiato is DeMaro's brother (J.A. 387). Such association is in no sense incriminating. But we wonder whether the government realizes what it has revealed, in urging that literal concept of guilt by "association".

Next, the government claimed (Br. 48-49) that "Passini was seen bringing a brown bag to Battiato's apartment . . ." Not so. The agent testified: "Several minutes later, Angelo Passini walked west toward Battiato's residence. *Ted DeRose* was walking with a noticeable limp and he was carrying a brown paper package under his left arm." (A. 267) DeRose was in fact shown by the evidence to be heavily involved. He had a very noticeable limp, just like Petitioner (J.A. 383, 270; P.A. 4) The similarity of walking styles may explain a great deal, especially in view of the government's obvious confusion as shown by its submission to the Court of Appeals.

Finally, it was claimed that on the same night, Petitioner ". . . participated in a conversation . . . regarding payment for the heroin. . . ." (G. Br. 49). Again, this could not have happened. The incident is supposed to have occurred in Andy's Grill (J.A. 271, 272). But at that time, another agent testified that Petitioner was in Battiato's house (J.A. 267). Agent Connolly, maintaining surveillance outside Andy's Grill, did not see Petitioner enter (J.A. 258; P.A. 2). The testimony was offered by a man who had never seen him before; who referred in his report to ". . . (a)

man . . . *later identified* as Angelo Passini"; who had nobody with him to help make the "identification"; and who had had at least two drinks in the course of a convivial evening, before seeing the man he later identified. (P.A. 3). The testimony of presumptively sober government agents, shows that Petitioner could not have been there. But DeRose was (J.A. 258). And very tellingly, yet another agent had observed DeRose delivering "a brown paper bag" to Battiato (J.A. 258). Not Passini. DeRose.

And that is the totality of the evidence against Petitioner.

It is obviously insufficient to establish guilt.

CONCLUSION

No disinterested person could read the record of this case, without experiencing a deep sense of disquiet at the result.

Nobody can read the opinion of the Court of Appeals, without appreciating the impairment of the right to counsel implicit and explicit therein.

We pray that your Honors will consider this case worthy of review.

Respectfully submitted,

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